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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 604.

UNITED STATES NATIONAL BANK OF SAN DIEGO, a National Banking Association, FIRST NATIONAL TRUST & SAVINGS BANK OF SAN DIEGO, a National Banking Association, and EMIL KLICKA,

Petitioners,

vs.

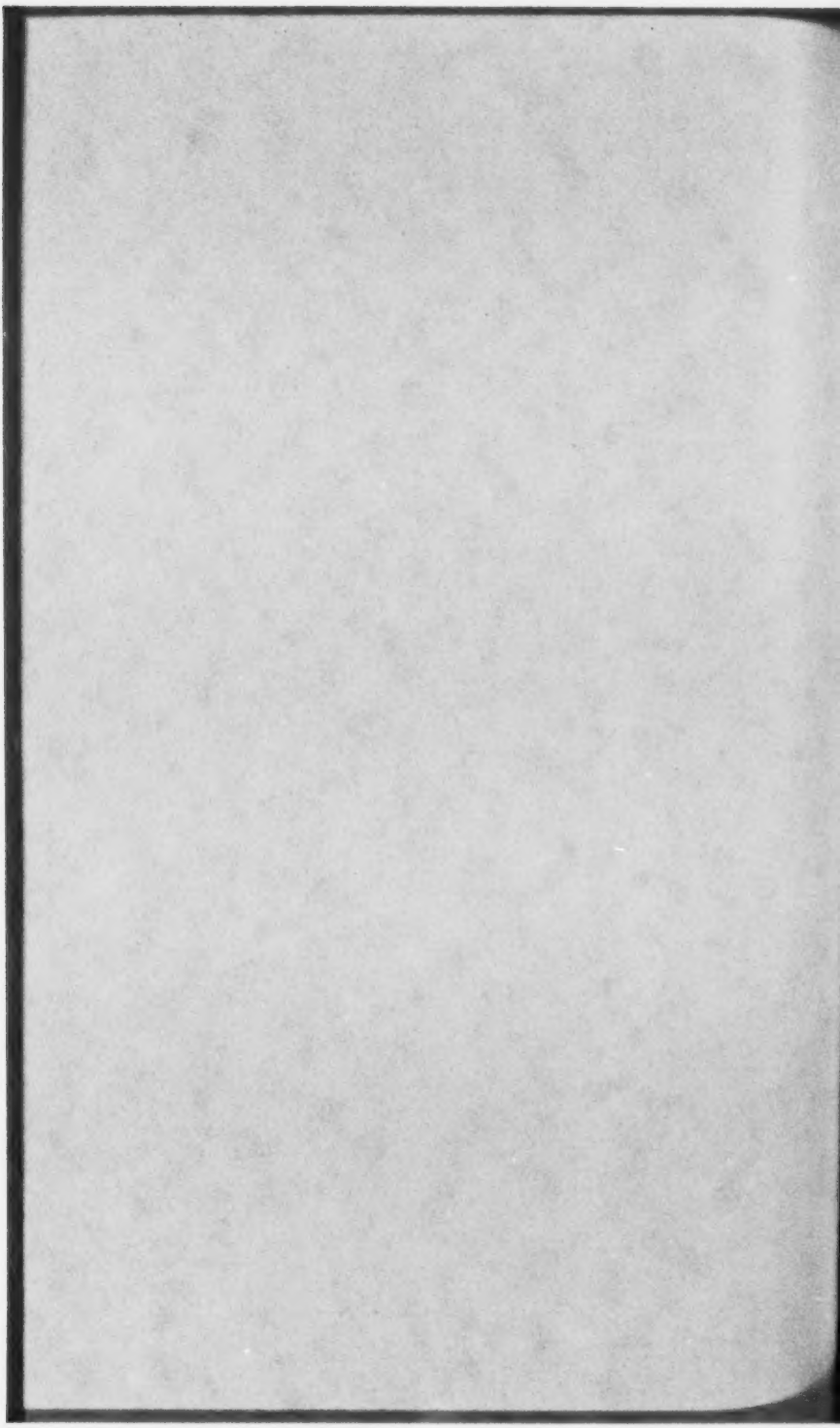
COUNTY OF SAN DIEGO, a Quasi Municipal Corporation, and CROWELL D. EDDY, as Assessor of San Diego County.

PETITIONERS' REPLY BRIEF ON PETITION FOR CERTIORARI.

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PETITIONERS' REPLY BRIEF ON PETITION FOR CERTIORARI.

May It Please the Court:

Petitioners respectfully ask leave to submit this brief in reply to respondents' brief in opposition to the petition for a writ of certiorari.

The Federal Questions Were Properly Raised and Expressly Preserved in the State Court.

The federal questions were not merely raised in the state court. They were expressly entertained, considered, discussed, and decided by that Court adversely to peti-

tioners' claims of immunity under the Constitution and laws of the United States.

> "Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment."
>
> *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 98.

That is precisely what the state court did in the instant case. [R. 161, 162.]

Respondents concede (p. 4) that the "second question" ("the unconstitutionality of the Bank and Corporation Franchise Tax Act," as construed and applied herein, for the first time) was raised in the original complaint by the allegation that direct taxation of the banking equipment would constitute double taxation. [R. 3.] But they say that this allegation is ambiguous, in that it may refer to the prohibition against double taxation in the California Constitution or the Political Code. It could not so refer, because there is no such prohibition in the California Constitution or in the Political Code, except in situations which are wholly irrelevant to the case at bar. The pertinent and controlling provisions of the California Constitution are set forth in the petition herein at pages 4 and 5. The provision in Political Code, section 3607, referred to by respondents, is as follows:

> "* * * but nothing *in this code* shall be construed to require or permit double taxation." (Cal. Stat. 1921, p. 184. Italics supplied.)

The Bank and Corporation Franchise Tax Act is not contained in the Political Code or in any code.

Said "second question" is an inherent corollary of the "first question" (the immunity from local taxation of the banking equipment of national banks). When that immunity is established, the inevitable sequence is that the California statute, as construed and applied below, is constitutionally invalid. In a situation identically analogous, this Court said:

> "As the statute was held valid after the conclusion of the Supreme Court of Colorado that the manner of state taxation of national banks must accord with Rev. Stat. 5219, 12 U. S. C. A. §548, and must not interfere with federal functions, it seems clear that the federal question as to the validity of the statute as tested by the Constitution and laws of the United States was necessarily involved and decided. This gives this Court jurisdiction of the appeal."
>
> *Colorado National Bank v. Bedford,* 310 U. S. 41, 47.

It follows that the state court entertained and decided both federal questions adversely to petitioners' contentions.

Respondents' assertion (p. 5) that "there was no real contest at any stage of the case on such federal point" is not supported by the record and does not accord with the fact. Likewise, their suggestion that "plaintiffs had raised the point, but failed to cite any authorities in support, thus constituting a waiver." The opinion of the state court refers to "the cases cited by defendants [obviously, by plaintiffs] as determining that furniture and other personal assets are exempt from state taxation * * *." [R. 161.]

The fact that the federal questions were discussed in both the prevailing and the dissenting opinions is proof that they had not been "abandoned" by petitioners.

The Decision of the State Court Does Not Rest Upon Adequate State Grounds.

Petitioners concede that if the decision below could be sustained upon grounds of state law, this Court should not take jurisdiction. But that is not this case. Petitioners claimed immunity under the Constitution and laws of the United States from local taxation. If that claim was valid, it entitled petitioners to an affirmance of the judgment of the trial court in their favor. In order to reverse that judgment, the California Supreme Court was obliged to do just what it did,—namely, to consider and deny petitioners' claim of federal immunity.

Respondents' assertion (pp. 7, 8) that "the determination as to what constitutes property * * * is altogether a matter of state law and is binding upon this Court," would be true if we were concerned herein with questions solely of the law of the state. But the controlling question herein is what did Congress mean by the phrase "real property" as used in R. S. 5219. That is a question upon which this Court speaks the last word.

Respondents' assertion (p. 9) that some of the vault doors (owned for the most part by the state bank co-plaintiffs who are not petitioners herein) are in premises that are owned, not leased, is sheer "smoke screen". The fact remains that the vault doors and other equipment owned by the national bank petitioners are in leased premises and that said petitioners have the right to remove them. It is also the fact that the vault doors and other equipment installed in the premises owned by petitioner Klicka are owned by the Bank of America, as lessee, with the right to remove same, and that a tax thereon will be a lien upon Klicka's real property. (See Petitioners' Opening Brief, pp. 6, 22.)

The Importance of the Federal Question.

As pointed out in petitioners' opening brief (pp. 25, 26), the question of the power of each of the forty-eight states to impose burdens of direct taxation upon all the national banks within its borders, is of real importance, not only to the banks and to the states, but to the Federal Government, which uses and needs to use the banks in its fiscal operations. The question is in fact much broader in its application than this. There are many other agencies of the Federal Government whose liability to state taxation will be determined by the decision of this question. There are, at the present time, more than thirty federal corporations which have been created to serve as agencies of the Government. (U. S. Government Manual, Index, pp. XI, XII.) As a rule, Congress has provided for each of those agencies, the same exemption from state taxation which is accorded to the national banks, namely, they are exempted from all state taxation, except taxes upon their "real property."[1] Some of those federal corporations have agencies and offices in every state of the Union. The Home Owners' Loan Corporation, for example, has approximately one hundred fifty such offices. (U. S. Government Manual, pp. 414, 415.) Those offices are, for the most part, equipped with fixtures and equipment substantially identical in character with the banking equipment which is involved herein (vaults, vault doors, counters, grills, cabinets, shelving, heating units, ventilating units, etc.). The decision of this case will determine whether or not all such equipment owned by federal agen-

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[1]For example: Home Owners' Loan Corporation, 12 U. S. C. A., §1463(c); Federal Home Loan Banks, 12 U. S. C. A., §1433; Federal Farm Mortgage Corporation, 12 U. S. C. A., §1020(f); Federal Deposit Insurance Corporation, 12 U. S. C. A., §264(p); etc., etc.

cies throughout the United States may be subjected to direct taxation by the several states. It is submitted that this is a question of general public importance.

Respondents' suggestion (pp. 10, 11), that petitioners (plaintiffs) stipulated away their entire case on the first morning of the trial in the court of first instance, comes too late to be taken seriously. It is made now for the first time, after nearly three years of bitterly contested litigation through three courts.

It is respectfully submitted that the public interest will be served by granting the petition in order to determine and settle the question of the extent of the power of the several states to impose burdens of direct taxation upon the agencies of the Federal Government.

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December, 1940.

